

FEDERAL ELECTION COMMISSION

**COMPLAINT OF JAY JACOBS, CHAIRMAN
OF THE NEW YORK STATE DEMOCRATIC PARTY**

COMPLAINANT,

MUR 6320

Against

JOHN GOMEZ,

CANDIDATE FOR NY 2D CONGRESSIONAL DISTRICT

LAWRENCE KELLY, an attorney duly admitted to practice in the courts of the State of New York, the United States District Court for the Eastern District of New York, the Southern District of New York, Second Circuit Court of Appeals and United States Supreme Court, submit this Affirmation under penalty of perjury in response to the Complaint of New York State Democratic Party Chair Jay Jacobs.

I am a volunteer for the campaign of John Gomez for the New York Second Congressional District. For purposes of this discussion I believe it is relevant to list my background as an Assistant District Attorney, Assistant County Attorney and Senior Rule of Law Advisor for the US State Department in Iraq. In that work, I have prosecuted individuals for the violation of clearly defined law, represented government workers sued for violation of clearly defined law, and attempted to build a respect for the rule of law in southern Iraq.

I have difficulty with Chairman Jacobs' complaint, as it seems in direct conflict with what was explained to me as the settled law of the Commission.

In the early part of 2010, my friend John Gomez indicated he was interested in running for Congress. Along with a few other friends, I volunteered to try to figure out the rules of the campaign.

In May 2010, I traveled to Washington DC for the two day FEC Seminar for Congressional Campaigns. I listened and asked questions at lectures and spoke to FEC staff and Commissioners at lunch and at breaks in the proceeding. A number of John's friends include individuals with large national audiences in talk radio, where they offer their individual views on matters of interest.

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The main issue I had was the use of the internet for fund raising and for email blasts and campaign fund solicitations from supporters. In direct conversations with FEC staff, I reviewed the consequences of using an individual with a Facebook account with over 200,000 friends for direct campaign solicitation. It was indicated to me that the internet was a free speech zone, and the FEC did not want to inhibit the use of the internet for campaign fund raising, solicitation or message forwarding.

The unanimous response was that the FEC wanted the broadest possible use of these new mechanisms to draw as many people into the political process and support full participation.

FEC paperwork indicated that

"Exchanging hyperlinks, forwarding emails and attaching downloaded pdf files are common ways most individuals use the internet to exchange information. The Commission is taking this opportunity to make clear that such activity would not constitute in kind contributions".

"A communication through one's own website is analogous to a communication made from a soapbox in a public square. There is no evidence in the legislative history of BCRA of a Congressional intent to regulate individual speech simply because it takes place through online media".

In further support of this position, the FEC noted "On September 5, 2003, the Committee on House Administration revised its own franking rules to remove mass email communications from the list of "unsolicited mass communications" requiring pre-authorization from the Franking Committee".

FEC Notice 2006-XX Internet Communications Agenda Document Number 06-20

In contrast, Democratic Party Chairman Jacobs has clearly spent a lot of time, money and resources to try to fashion a choke collar on the free run of political speech by individuals seeking to unseat his incumbent. I would note that incumbent has unrestricted free mass emails under the Franking Privilege. By alleging that Facebook accounts or websites have some corporate connection, Democratic Chairman Jacobs seeks to have the FEC prohibit the use of internet or Facebook resources by individual supporters of a challenger in a campaign while the incumbent can email every email address in the world every minute of the day at public expense.

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In the unnumbered second page of Point 5 of Chairman Jacobs Complaint, he indicates that "lastly, the email was not distributed generally to the public, it was distributed to individuals on Hannity's list". I did not see Jay Jacobs or Steve Israel at the FEC Conference in May, but distribution to Hannity's list was the one question I thought was definitively answered at the conference. There are no limitations.

What exactly is the legal technicality which justifies a restraint on Hannity's First Amendment rights, to support a candidate? What are Gomez' First Amendment rights, in being able to advise the voting public of his positions? What are the First Amendment rights of the people on "Hannity's list" to receive this information in order to be fully informed for the election? These are all matters of constitutional importance, ignored by Chairman Jacobs.

If one was to adopt Jacobs view of the Constitution, how would one justify the chilling effect in the United States if one had to measure the contractual minutiae of one's internet connection to determine if there was a prior restraint by the government on the use of the internet? Would use of a doctor's office email be illegal if the doctor was part of a professional corporation? What if the internet connection was a claimed business expense? Does that make its use criminal under the Justice view of the Constitution?

Chairman Jacobs alleges, further, that any clerical assistance in sending an email removes the immunity for an individual volunteering to engage in uncompensated internet activity. Footnote 8 on page 3 of the Jacobs Complaint. (alleging that this use of a clerk to send the email destroys any immunity under 11 CFR 100.94). This, I believe, is the first assertion that there exists a clerical abrogation of Constitutional rights.

Does anyone but the New York State Democratic Party want to go down this path? If I ask my secretary to pass on a personal email, does that make it a corporate email? If I send it to a friend using the satellite technology to a small unit in Iraq, does that make it a government email? This push down a slippery slope of censoring the use of the internet is exactly the point the FEC lecturers were making in their presentations in the May Seminar when they indicated the FEC had no interest in becoming the arbiter of where the use of the internet becomes illegal. The use of the internet is not illegal, it is encouraged, and the FEC will endeavor to spread that message.

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But the FEC is not the universe. Instead, the very filing of a complaint with the FEC has had its intended effect, chilling any comment on the Gomez campaign by the parties named in the complaint. The lawyers have now shown up, the "free use" of the internet encouraged by the FEC will be shut down for the foreseeable future, and those who seek to put a choke hold on the use of the internet by challengers have won a major tactical victory. Criminal and civil penalties, the prospect of extended litigation and the endless cash of the incumbent party arrayed against the respondents will have that effect.

This is in line with a piece in the New York Times authored by my law school Professor Joel Gora, who indicated that a number of key First Amendment principles have become obscured in the zeal to "reform" our elections.

"Our incredibly complex system of campaign finance rules and regulations - about who can speak and what can be said and when it can be said - presided over by the government bureaucrats at the Federal Election Commission, and backed up by criminal and civil penalties, has created, in effect, a de facto system of prior restraint which causes a chilling effect on political speech all over the country."

July 14, 2010 Restoring Free Speech in Elections: Essay by Joel Gora

This unfortunate reality stands in contrast to the summary of the FEC discussions I wrote on May 3, 2010:

"The session today dealt with the use of the internet. FEC regs are drafted to let the market run free according to one Commissioner who testified. I tried to analyze SH's Facebook in light of these regs, and the Commissioner indicated it made no difference if someone (I used the example of a woman) posting had 15 friends or 270,000 friends, the FEC considers such use exempt from regulation".

The materials provided by the FEC in the seminar underscored this commitment to free use of the internet, using the example of an individual on a soapbox in a public square. I was reminded of Eamon DeValera, the Irish patriot. After being arrested by the British for making a speech on Irish independence in a Dublin square, De Valera was released after a year and walked back to the park, back to the soapbox, and began by stating "As I was saying...." The FEC recognizes that free speech is to be encouraged, as it marks a leadership willing to engage in public debate. As De Valera's example pointed out, to try to stomp out the free expression of ideas on political matters only serves to underline the distance between those in power and those being governed.

Indeed, when one looks at the FEC regulations adopted in 2006, the FEC memo quotes Senator Russ Feingold as indicating ~~any~~ limitations on the use of such media ~~is against the spirit and intent of the legislation as Congress wrote and passed the bill.~~

" The Commission notes that Senator Russ Feingold, one of the BCRA's sponsors, stated recently that "linking campaign web sites, quoting from or republishing campaign materials, and even providing a link for donations to a candidate, if done without compensation, should not cause a blogger to be deemed to have made a contribution to a campaign or trigger reporting requirements." 2006 FEC Internet Communications Decision".

Foolish me. That does not stop the New York State Democratic Party from seeking to inhibit speech. Alleging that Sean Hannity's personal property (Facebook, Hannity.com) has some ~~tangential~~ corporate shell, (a matter, it would appear, which is meant more to force him to disclose ownership rights and private contractual relationships), Democratic Party Chairman Jacobs would have the May FEC Seminar stand as a testament to empty words and unfulfilled promise. For if your internet site has any commercial business function, it appears that every small businessman in the United States should, in the opinion of the New York State Democratic Chair, have a different set of rules to follow. That rule can be summed up as follows: "Don't use the Internet, don't get involved in the public debate on the Internet, Big Brother is watching, and the minisitar is set to Orwell's 1984."

That has been, in effect, the ~~main~~ of the Complaint. Corporations with any tangential relationship to this complaint have no interest in battling the anti business federal administration. Better to let the "haves" in government run "their" government rather than do fruitless battle. Keep your head down until their excesses , despite all of the advantages of incumbency, bring them down.

The mix includes the outrageous advantages which incumbents have over challengers in Congressional races. In the battle of Davids ~~versus~~ incumbent Goliaths, the incumbents would ~~not want~~ the FEC to consider that emails for Members of Congress have been unregulated and free of public limitation as part of the Franking privilege since 2002. That is the province of the "haves" , as they do their best to keep the "have nots" out of their government. Limiting the opportunity to email support of a friend running for office will be the legacy of this complaint, no matter what the Commissioners eventually decide. All of the broad strokes and free access speeches are worthless words when this type of complaint can so easily close down free speech, as it has.

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In Iraq, when the members of our Provincial Reconstruction Team were dealing with the latest dysfunctional attempt at organizing a post election provincial government, my colleagues in the provincial reconstruction team brought me in an example of an even more dysfunctional government, the New York State Senate. As Ed Koch has said about the Democratic President of the New York State Senate and the State Senate Democrats " what they are doing is using the process of government, not for good government, but to be able to remain, and feed at the public expense. They like to be reelected and elected time after time , and not do anything to earn their pay."

In the instant scenario, the incumbent Democratic Member of Congress was so petrified at what this internet fund raising might do, he filed (by his proxy the Democratic State Chair) this Complaint before the reporting period closed. Rather than money sufficient to challenge his leaked multi-millions dollar for dollar, the actual monies received reflect the economic depression caused by the Democratic leadership's policies. There is little money left in the US for the haves nots to challenge the "haves" in government on a level playing field. The haves will clearly use any tool they have at their disposal to discourage free speech and the dissemination of facts to the public. Without the free use of the internet, the only tool left to the voters is to vote out the "haves" on November 2. On that day, there will be no attorneys, no State party leaders, and no incumbents standing in the way of voters who have had enough of the gamesmanship and the empty promises of open and fair discussion.

If the FEC wanted to declare the internet free of restraint, they should have made it clear at the FEC Seminar that they would bounce back any allegations dealing with the internet. If the FEC is willing to abide campaigns frozen by politically inspired allegations against the candidate for receiving contributions from the internet, then they should not be holding seminars in which they indicate that the internet is free and open to innovative concepts for getting people involved in political campaigns. The New York State Senate President Malcolm Smith indicated recently that he planned to redistrict New York State Republicans "into oblivion" for the next twenty years. The New York State Democratic Chair, having placed Democrats in almost every house sent from New York, makes clear how he has similar plans for the use of the internet in challenging "his" incumbents.

As Professor Gora indicated in his New York Times piece, the New York State Democratic machine is lining up against Justices Black, Warren and Douglas, who Gora describes as "perhaps the three greatest liberals who ever sat on the Supreme Court" when they wrote :

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"Under our Constitution it is We the People who are sovereign. The people have the final say. The legislators are their spokesmen. The people determine through their votes the destiny of the nation. It is therefore important - vitally important - that all channels of communication be open to them during every election, that no point of view be restrained or hampered, and that the people have access to the views of every group in the community."

This complaint by Chairman Jacobs is an example of why the majority of Americans have come to a lack of trust in their government. The people in power make it up as they go along. Rather than the simple elegance of the Founders in unleashing the power of free and open expression unburdened by government licensing or prior restraint, we have entered a purgatory. A place where any speaker or act against the entrenched powers in government can be chilled by opening an investigation with a federal agency or enforcing a clause in subparagraph 4(d) subsection 2 in some document unread by any Member of Congress. If Chairman Jacobs is an point in his complaint, (and he spends a lot of time trying to obscure that Hannity seems to be protected as acting as an individual volunteer engaging in uncompensated internet activity), then there really do not seem to be any fixed rules. And, as Professor Gora notes, all of that is inherently unconstitutional and, at the end of the day, un-American.

Before I became a prosecutor, my brothers who practice law urged me to be sure I could look myself in the mirror as well on my last day as a prosecutor as I did on the first day. I do not see how anyone involved with this election law, which seems a free floating exercise in unconstitutional restraint, could honestly look at themselves in the mirror if they were now to impose further limitations on the use of the internet and other new technologies for election purposes. As Justice Douglas noted "The Constitution is not neutral. It was designed to take government off the backs of people." The Court Years, Random House 1980 page 8. That is the guide for all of us, and Chairman Jacobs adds no new take on the Constitution to indicate restraint on free speech is urged therein for new media.

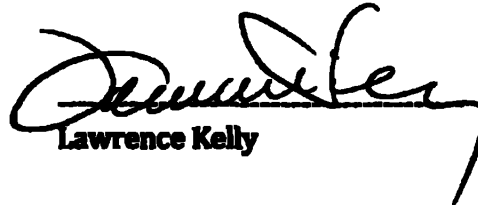
It appears that Chairman Jacobs sole intent, then, was to chill political speech by the blunt instrument of his position as Chair of the State Immunitie Committee and his use of a federal agency in a Washington DC in a Capital City completely run by the Democratic Party. He has succeeded, for the short term, in that purpose, allowing his incumbent Member of Congress reason to cheer that political gamesmanship has afforded him another advantage. The FEC, however, should reflect on some other words of Justice Douglas;

"Free Speech is not to be regulated like diseased cattle and impure butter. The audience that hissed yesterday may applaud today, even for the same performance."

In other words, the First Amendment does not depend upon your point of view. It stands as a bulwark against government having a point of view when it comes to the content of a citizen's speech.

For all of the above reasons, the respondent John Gomez requests the Commission find that no action should be taken against him in response to the Complaint of the Democratic Party Chairman Jacobs, and, alternatively that the complaint does not warrant the use of Commission resources and be dismissed.

Dated; July 14, 2010


Lawrence Kelly